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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTHONY J. KINNEY, EDGAR BENJAMIN CAHOON,
HOWARD GLENN DAMUDE and ZHAN-BIN LIU

Appeal 2009-015186
Application 10/776,311
Technology Center 1600

Before ERIC GRIMES, BEVERLY A. FRANKLIN, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING[1]

Appellants request rehearing of the decision entered November 1, 2010 ("Decision"). The request for rehearing is denied.

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants' Request for Rehearing contains numbered sections "1" and "2", and section 2 contains lettered subsections "A" through "H". Of these parts of the Request for Rehearing, section 1 and subsections 2(A), 2(B), 2(C), 2(F), 2(G), and 2(H) do not allege that any points were overlooked or misapprehended in the Decision. They therefore do not present any proper basis for granting rehearing. *See* 37 C.F.R. § 41.52(a)(1) (A "request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board").

Appellants argue that "Finding of Fact 17 in the Decision on Appeal overlooks several important facts" (Req. Rhg. 5). However, none of the facts alleged to have been overlooked are contrary to FF17 (Decision 7) or any of the other facts found in the Decision.

Appellants also argue that "Finding of Fact 18 in the Decision on Appeal overlooks the fact that 'exposing' a substrate to an enzyme may involve exogenously adding the substrate as was the case in Example 3" of Abbott Laboratories (Req. Rhg. 6).

This argument does not persuade us that the Decision overlooked or misapprehended relevant facts. Finding of Fact 18 states that Abbott Laboratories discloses introducing an elongase-encoding DNA into a host cell to convert a substrate polyunsaturated fatty acid (PUFA) into a product PUFA, then exposing the product PUFA to a desaturase to produce, for example, an ω-3 fatty acid such as eicosapentaenoic acid (EPA) (Decision 7). The fact that, as Appellants point out, the "exposing" step could be carried out either (a) by isolating the elongase-product PUFA and then adding it exogenously to cells producing a desaturase enzyme, or (b) by

expressing both the elongase and desaturase in the same host cell, does not cast doubt on whether the series of reaction steps suggested by Abbott Laboratories would successfully produce an ω-3 fatty acid such as EPA.

Finally, Appellants argue that "Finding of Fact 20 in the Decision on Appeal fails to appreciate that if exogenous application of the substrate DPA (via spraying) (Columns 19-20 and Examples 3 and 4) was required, because the Browse et al. transgenic plant could not make the substrate *in vivo*" (Req. Rhg. 7).

This argument also fails to persuade us that the Decision overlooked or misapprehended relevant facts. Finding of Fact 20 was cited as evidence that the ω-3 desaturase disclosed by Browse converts the ω-6 fatty acid arachidonic acid into the ω-3 fatty acid EPA (Decision 9). Appellants have pointed to no evidence that suggests that the exogenous application of the substrate in Browse's system casts doubt on whether Browse's desaturase enzyme carries out the disclosed reaction.

SUMMARY

Appellants have not shown that we overlooked or misapprehended any issue of fact or law in reaching our previous Decision. The Request for Rehearing is denied.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REHEARING DENIED

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